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Supreme Court of the United States

October Term 1975

GENERAL ELECTRIC COMPANY,
Petitioner,
v.
MARTHA V. GILBERT
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
Respondents.

MARTHA V. GILBERT,
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Petitioners,
v.
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On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

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This brief *amici curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union UAW with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 111 national and international labor organizations, having a total membership of approximately 14 million. As such it is the majority spokesman for the trade union movement. The International Union UAW is the largest independent industrial union in this country, having a membership of approximately 1,500,000. Women comprise a substantial portion of the membership of both organizations.

All of the women members of the *amici curiae* who are of child-bearing age are directly affected by the issues in this case. Unless the decision below is affirmed they may become disabled from work by pregnancy and nonetheless be without income protection during the period of such disability. Thus, one of the first priorities of the AFL-CIO and its affiliates and of the UAW has been reform of the features of the income disability programs that discriminate against women during pregnancy. It is for this reason that the *amici curiae* have determined to take this opportunity to present their views to this court.

The AFL-CIO and UAW filed a brief *amicus curiae* in *Liberty Mutual Insurance Co., Inc.* v. *Wetzel* ("*Liberty* Brief"), No. 74-1245. The present brief does not repeat in detail the legal analysis presented in the *Liberty Mutual* brief; rather, it demonstrates that precisely the same analysis applies to this case and requires affirming the decision of the Court of Appeals.

ARGUMENT

1. In their brief in *Liberty Mutual, supra,* the present *amici* presented the following argument: The basic issue

is whether a private employer violates Title VII of the Civil Rights Act of 1964 if it excludes from a broad income protection program disabilities which in their medical effect upon an employee's ability to work are indistinguishable from those covered but which are due to pregnancy or complications resulting directly from pregnancy. While employers have relied on *Geduldig* v. *Aiello,* 417 U.S. 484, for the proposition that Title VII does not reach this classification because it is not based on "gender as such" (*id* at 496), §703(a)(2) of the Act (42 U.S. §2000e-2(a)(2)), reaches *any* classification which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's • • • sex," even if the line is not drawn on a gender basis. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971)[1] and *Phillips* v. *Martin Marietta Co.,* 400 U.S. 549 (1971), as well as the legislative history of the 1972 amendments to the Act (*Liberty* Brief at 8-9) make clear that Title VII is violated if a distinction adversely affects the status as employees of a large group of women but no men, unless the rationale for the distinction rises to the level of a "business necessity." The exclusion of pregnancy from a broad disability program which is a form of compensation

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[1] General Electric suggests (Brief for Petitioner at 34, n. 25) that *Griggs* is inapposite because it is a "race" case. But the language of the Act is precisely the same with regard to race and to sex classifications, and Congress in 1972 expressly disclaimed any intent to differentiate between the two types of discrimination (*Liberty* Brief, at 9). Nor is this Court's "[reluctance] to treat sex as a suspect classification" (Brief for Petitioners at 34, n. 25) in constitutional cases of any relevance in parsing a statute which in language and intent treats race and sex distinctions as equally disallowed.

to employees adopted to promote security, productivity, and loyalty has precisely the prohibited effects: like other distinctions based on pregnancy, it relegates most women to a special, second-class status with regard to career advancement and continuity of employment. (*Liberty* Brief, at 18-19.) This sort of discriminatory impact is at the heart of §703(a)(2) and, therefore, cost considerations *alone* cannot justify it. At any rate the record in that case demonstrates that Liberty Mutual did not arrive at the decision to exclude pregnancy on the basis of actuarial considerations; rather, the distinction was the last of many special policies relating to pregnancy, some of which are conceded to be violative of Title VII, and was retained only because it was the one of these distinctions the company believed it could legally maintain.

2. Precisely the same analysis applies to this case. As in *Liberty Mutual,* the income maintenance program is a form of compensation to employees. Here, in fact, the program is funded entirely by the company, with no employee contributions, and is paid by the company itself rather than through an insurance program (Pet. App. 8a). The income maintenance program is even broader in coverage than that in *Liberty Mutual;* the *only* exclusion is for pregnancy-related disabilities (Pet. App. 13a-14a, 28a) (see *Liberty* Brief, at 21-22 n. 18). And, not only is it clear here that abnormal complications of pregnancy are not covered (see *Liberty* Brief, at 3, n. 1), but disabilities entirely *unrelated* to pregnancy but beginning while an employee is on pregnancy leave are similarly excluded (Pet. App. 11a).[2]

Thus, in this case the *only* employees unable to work for

[2] The exclusion of complications of pregnancy and of unrelated

medical reasons refused income maintenance benefits for a class of disabilities are women; and women are in some instances refused benefits for the *same* ailments which a man can suffer and for which he would receive benefits. Whether the classification which creates this effect is based upon "gender as such" or upon another criteria is irrelevant for purposes of §703(a)(2).

Moreover, since this program, like the one in *Liberty Mutual,* is a private, employer-funded form of compensation created for purposes related to the efficient operation of a particular business, the only pertinent analysis is whether exclusion of pregnancy-related disabilities "adversely affect[s] [women's] status as *employees,*" §703(a)(2) (emphasis supplied). The focus must therefore be upon the effect upon their careers of depriving a large group of women of benefits instituted to enhance career development prospects, an analysis entirely different from that developed outside the employment relationship context in *Geduldig, supra.*

3. Like Liberty Mutual, General Electric has had a history of treating pregnant women specially in ways which impede their job opportunities and status as employees.

disabilities, and the inclusion of truly self-induced disabilities such as cosmetic surgery and suicide attempts, together refute Petitioner's attempt (Brief for Petitioner, at 55, 63) to justify the pregnancy exclusion as consistent with a supposed purpose of the sickness and accident program, "to soften the blow to employees of an *unintended* and *unexpected* sickness or accident" (*id.* at 63, emphasis supplied). In fact, the program does pay for intended, expected disabilities, and does not pay for complications of pregnancy or disabilities unrelated to pregnancy but beginning while the employee is on pregnancy leave, though these are neither expected nor intended.

In particular, General Electric had, until 1971, a policy of mandatory maternity leaves (Pet. App. 9a, 22a, 36a-37a; see *Liberty* Brief at 14-16) and even after this mandatory leave policy was abandoned, no pregnant women were hired (II App. 723; see *Liberty* Brief at 14). General Electric, like Liberty Mutual, appears to recognize that these sorts of policies based on pregnancy are sex-discrimination, for it abandoned both during the course of this litigation.

Yet, the interrelationship between such policies and that Petitioner is defending in this case is made clear by the very statistics upon which the company relies to buttress its argument that pregnancy related disabilities are *sui generis*. Thus, GE presents figures for the average duration of pregnancy absences (Brief for Petitioner at 9, n. 10) derived from a period when mandatory absences were still in effect; obviously, these figures tell us nothing about what the average periods would be if only ability to work determined pregnancy absences. Similarly, the figures for the percentage of women who do not return to work after pregnancy leave are to an indeterminate degree infected by the Company's policy of automatic termination eight weeks after delivery if the employee has not by then returned (Pet. App. 23a). Thus, GE is attempting to buttress its present discrimination based on pregnancy with statistics influenced by other distinctions which helped to create a situation in which a large group of women are treated as temporary rather than career employees.

As developed in the *Liberty* Brief, at 15-19, all of the purposes for which income maintenance programs are developed by employers apply to pregnancy-related disabilities at least as much as they apply to other disabilities. The reasons GE gives to the contrary, Brief for Petitioner

at 55-57, all are based not upon a showing of inapplicability, but upon factors unrelated to the basic disability income program. For example, if indeed women expecting children would leave work before they are themselves medically unable to work, or return long after their health has been restored, or resign after collecting benefits, the fault would be with the administration of the program, not with the basic congruence between the purposes of providing disability benefits and the situation of a woman disabled for reasons relating to pregnancy or child-birth. By requiring for all disability benefit recipients company-supervised medical examinations, or by linking benefits to return to work, GE could curb *abuses* of the program. The need to prevent abuses cannot justify the complete exclusion of pregnancy-related disabilities, when the result is that a large group composed entirely of women are rendered insecure in their jobs, made less productive because of monetary worries, induced to choose less attractive employment to assure steady income,[3] and made aware that their employer is not concerned with retaining her loyalty or with developing her career (*Liberty* Brief 16-18).

4. Finally, as in *Liberty Mutual,* Petitioner has shown no "business necessity" for its pregnancy exclusion. Indeed, it has expressly declined to rely on this defense (Pet. App. 30a; Brief for Petitioner, at 60, n. 67).

Petitioner does maintain that "business considerations"

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[3] In particular, the record in this case with regard to Ms. O'Steen demonstrates the financial hardship caused by the exclusion (Pet. App. 29a, n. 10), which could both decrease an employee's devotion to her job in the future and induce her to seek a less attractive job in which she would be spared such hardships should she become pregnant again.

justify the exclusion. Aside from the fact that this is an attempt to smuggle in by another name a defense GE orginally declined to make, most of the reasons given, as discussed above, either would justify only a more careful administration of the program rather than complete exclusion or do not stand up to analysis—e.g., the "voluntary" distinction. Thus, as the district court found, the only justifications which merit more than passing consideration are those related to cost (Pet. App. 23a-24a). But, as that court also found, not only is cost alone an inadequate justification when unrelated, as it was in *Geduldig, supra,* to policy considerations (Pet. App. 30a; *Liberty* Brief, at 20-21), but it is impossible from the evidence offered to derive any realistic estimate of the cost to GE of eliminating the pregnancy distinction (Pet. App. 23a, 31a).

Indeed, the record and findings in this case illustrate graphically both the propensity to infect cost estimates with sexual sterotypes (*Liberty* Brief, at 20, n. 16), and the reasons why the cost, even if high, of adding pregnancy-disability coverage cannot in itself rise to the level of a business necessity. For, as explained above, GE's cost arguments are based upon periods during which other pregnancy-based distinctions were influencing the length of pregnancy leave, and also upon the same assumption about a special female tendency to malinger found in *Liberty Mutual* (see *Liberty* Brief, at 20, n. 16, Pet. App. 23a).[4] Moreover, as the district court noted, there has been

[4] Also, while the district court found that the average period of medical disability due to pregnancy is six to eight weeks (Pet. App. 20a), the nationwide cost estimates GE relies upon, which in any event are not relevant to the justification for *GE's* exclusion, are based on much longer periods (Brief for Petitioner, at 8).

no attempt to factor out other disabilities which may similarly have high costs and are largely, if not exclusively, suffered by men (Pet. App. 32a). In particular, it seems telling that although it relies here upon the fact that pregnancy is "voluntary," the company has not seen fit to exclude pregnancy from its medical benefits, despite the high cost of such coverage (I App. 181; III App. 1063), so that male employees' *are* covered for the cost of their wives' deliveries.

CONCLUSION

For the reasons stated above, and in our brief *amicus curiae* in *Liberty Mutual Life Insurance Co.* v. *Wetzel,* the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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